

# AXELROD & ASSOCIATES, P.A.

Attorneys and Counselors at Law

*"Success is all that matters"*

Stuart Mark Axelrod†  
W. Christopher Castro\*  
Tristan M. Shaffer  
Emily M. Sordian‡

4701 Oleander Drive  
Myrtle Beach, SC 29577  
Phone: (843) 916-9300  
Fax: (843) 916-9311

†Certified Family Court Mediator  
\*Currently on Active Military Leave  
‡Certified Guardian Ad Litem

February 20, 2015

Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

**RE: Matthew Gerald #286815 v. State of South Carolina**  
**Case No.: 2012-CP-33-0438**

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Gerald in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,



Tristan M. Shaffer

TMS/dke

cc: Croom Hunter, Esquire  
Marion County Clerk of Court  
Loreen French  
Matthew Gerald

**RECEIVED**

FEB 23 2015

**S.C. Supreme Court**

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM MARION COUNTY  
In The Court of Common Pleas

Honorable Edgar W. Dickson  
Common Pleas Judge of the Twelfth Judicial Circuit

**RECEIVED**

FEB 23 2015

**S.C. Supreme Court**

Case No.: 2012-CP-33-0438

Matthew Gerald, #286815,

Petitioner,

v.

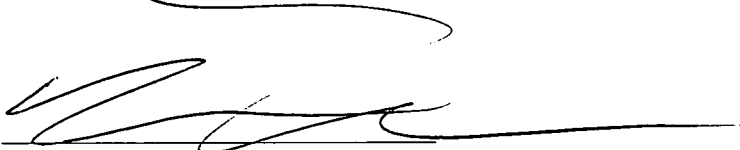
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable Edgar W. Dickson dated December 19, 2014, filed January 9, 2015 and received by Petitioner on January 28, 2015.

February 20, 2015

  
Tristan M. Shaffer, Esq.  
AXELROD & ASSOCIATES P.A.  
4701 Oleander Drive  
Myrtle Beach, SC 29577  
(843) 848-6708 Phone  
(843) 848-6709 Fax  
[Tristan@Gotaxelrod.com](mailto:Tristan@Gotaxelrod.com)  
*Attorney for Appellant*

Respondent's Attorney:  
Croom Hunter, Esquire  
S.C. Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211

SUPREME COURT OF SOUTH CAROLINA

RECEIVED

FEB 23 2015

S.C. Supreme Court

APPEAL FROM MARION COUNTY  
In The Court of Common Pleas

Honorable Edgar W. Dickson  
Common Pleas Judge of the Twelfth Judicial Circuit

Case No.: 2012-CP-33-0438

Matthew Gerald, #286815, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

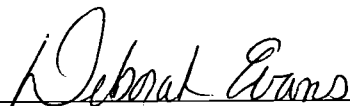
I, Deborah Evans, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Croom Hunter, Esquire  
S.C. Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211

Matthew Gerald  
Lieber Correctional Institution  
136 Wilborn Avenue  
Ridgeville, SC 29472

Marion County Clerk of Court  
P.O. Box 295  
Marion, SC 29571-0295

Loreen French  
Appellate Defense  
1330 Lady Street  
Columbia, SC 29201

  
\_\_\_\_\_  
Deborah Evans  
Paralegal to Tristan M. Shaffer

February 20, 2015  
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF MARION )  
 )  
MATTHEW GERALD, #286815 )  
 )  
vs )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

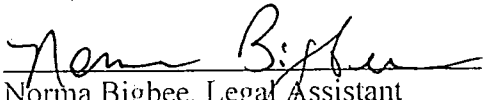
IN THE COURT OF COMMON PLEAS  
2012-CP-33-0438

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a filed copy of the Order of Dismissal, in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Tristan Michael Shaffer, Esquire**  
4701 Oleander Drive  
Myrtle Beach, SC 29577

DATED this 27<sup>th</sup> day of January, 2015.

  
Norma Bigbee, Legal Assistant  
For Respondent

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CH

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )  
Matthew Gerald, #286815, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
TWELFTH JUDICIAL CIRCUIT

Case No. 2012-CP-33-0438

**ORDER OF DISMISSAL**

This matter comes before this Court by way of a post-conviction relief (PCR) application filed on June 27, 2012. Respondent made its return on December 10, 2013.<sup>1</sup> An evidentiary hearing into the matter was convened on October 8, 2014, at the Florence County Courthouse. Applicant was present at the hearing and was represented by Tristan M. Shaffer, Esquire. Respondent was represented by Assistant Attorney General J. Croom Hunter of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

Applicant is currently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment from the Marion County Clerk of Court. In May 2011, the Marion County Grand Jury indicted Applicant for kidnapping, first degree criminal sexual conduct, and lewd act on a minor (2011-GS-33-0129). Henry M. Anderson, Jr., Esquire, represented Applicant. On August 22, 2011, Applicant pled guilty to kidnapping and first degree criminal sexual conduct. In exchange for the plea, the State dismissed the lewd act indictment. The Honorable Michael G. Nettles sentenced Applicant to consecutive terms of eight (8) years

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<sup>1</sup> Respondent did not receive the Application from the Marion County Clerk of Court until June 20, 2013.

imprisonment for kidnapping and twenty-three (23) years imprisonment for criminal sexual conduct. Applicant did not appeal his plea or sentences.

### ALLEGATIONS

At the post-conviction relief hearing, Applicant proceeded to argue his confinement is unlawful based upon the following grounds:

1. Ineffective assistance of counsel.
  - a. Failure to thoroughly advise Applicant of the consequences of pleading guilty, specifically counsel's failure to advise Applicant that his sentences could be run consecutively.

### SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. This Court also heard testimony from trial counsel, Henry M. Anderson, Esquire (Counsel). This Court also had before it a copy of the trial transcript, the Marion County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

During the evidentiary hearing, Applicant testified that he was represented at his plea by Henry M. Anderson, Esquire (Counsel). Applicant testified he is currently incarcerated at Lieber Correctional. Applicant testified he pled guilty and received consecutive sentences of eight (8) years and twenty three (23) years imprisonment. Applicant testified Counsel first met with him a couple of months after his arrest. Applicant testified Counsel told him if he pled guilty, his sentence would be up to the judge. Applicant testified Counsel did not discuss the State's allegations, or the elements of the crimes with which he was charged. Applicant testified Counsel told him Judge Nettles was a good judge before whom to enter his plea. Applicant testified Counsel kept telling him his sentence would be up to the judge. Applicant testified he did not

understand that his sentences could be run consecutively. Applicant testified he thought his sentences would be run together. Applicant testified he does not recall the solicitor asking for consecutive sentences. Applicant testified he would possibly have still pled guilty if he knew the sentences would be consecutive, but he would not have pled that day. Applicant testified he wants to serve his sentences concurrently. Applicant testified he did not understand what an open plea entailed.

On cross-examination, Applicant testified he had prior convictions for attempted burglary, burglary third degree, forgery, passing fraudulent checks, ABHAN, and driving under suspension. Applicant testified those convictions were all the result of negotiated pleas. Applicant testified the State dismissed a Lewd Act charge in conjunction with this plea. Applicant testified he is guilty of the crimes to which he pled guilty. Applicant testified the facts the solicitor told the plea judge were true. Applicant testified he told the plea judge he understood he was waiving his rights to a jury trial and to challenge the evidence against him. Applicant testified he told the plea judge that he understood the solicitor was seeking consecutive sentences. Applicant testified he told the plea judge he was satisfied with Counsel's performance. Applicant testified he told the plea judge he understood all of his conversations with Counsel. Applicant testified he told the plea judge he understood the elements of the offenses with which he was charged, as well as the collateral consequences. Applicant testified he told the plea judge he did not need any more time to consult with Counsel. Applicant testified he told the plea judge he understood all of the judge's questions. Applicant testified he was not truthful when he answered the plea judge's questions regarding concurrent versus consecutive sentences. Applicant testified it was standard practice to lie to the judge at a guilty plea.

Following Applicant's testimony, Henry M. Anderson, Esquire (Counsel) testified.

Counsel testified he took this case as a contract public defender with the Twelfth Circuit Public Defender's Office. Counsel testified he obtained full discovery from the State and went over the charges with Applicant. Counsel testified he explained the elements of the charges Applicant was facing. Counsel testified the evidence against Applicant was overwhelming. Counsel testified Applicant dragged the victim, a young boy, into an abandoned house, where he beat and sexually assaulted the victim. Counsel testified a neighbor heard the victim's screams and ran into the house where he witnessed the assault. Counsel testified Applicant ran from the house, but he was apprehended shortly thereafter and positively identified as the perpetrator. Counsel testified he met with Applicant at least three (3) times. Counsel testified he did not need to meet with Applicant more than that. Counsel testified he was prepared. Counsel testified the solicitor would not consider any plea offers in Applicant's case. Counsel testified the solicitor informed him he planned to try the case at the first term of general sessions possible. Counsel testified the solicitor told him not bother asking for any deals. Counsel testified the solicitor took a special interest in Applicant's case and told Counsel he would seek consecutive sentences. Counsel testified he explained to Applicant that his plea would be open. Counsel testified he explained the ramifications of an open plea, as well as the constitutional rights Applicant waived by entering a guilty plea. Counsel testified he told Applicant the solicitor was seeking consecutive sentences. Counsel testified he explained the difference between concurrent and consecutive sentences to Applicant. Counsel testified he had no concerns about Applicant's ability to understand their conversations. Counsel testified Applicant made the decision to plead guilty.

#### **INEFFECTIVE ASSISTANCE OF COUNSEL**

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the

application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

This Court finds Applicant failed to demonstrate that Counsel's performance was deficient in any way. This Court further finds that Applicant presented no evidence to show any prejudice resulting from Counsel's representation. Additionally, this Court finds Counsel's testimony credible and Applicant's testimony not credible.



This Court finds that Counsel met with Applicant an adequate number of times prior to the guilty plea. This Court further finds Counsel obtained discovery from the solicitor and went over it with Applicant. This Court further finds that Counsel thoroughly investigated and prepared Applicant's case. Here, Applicant argues he did not understand what a consecutive sentence was, nor was he aware the State was recommending such a sentence. However, the Record reflects both the State's recommendation of a consecutive sentence, as well as Applicant's response that he understood the consequences of his guilty plea, including the possible sentence he faced with an open plea. Further, plea counsel testified at Applicant's PCR hearing that the State was very clear in what their recommendation would be, and that he conveyed this recommendation, as well as explained what it meant to Applicant. There is no evidence that Counsel's performance departed from what is reasonable under professional norms. Applicant testified at his plea that he fully understood the charges and the possible consequences and was satisfied with the services of his attorney. Further, even if this Court were to find there was error on plea counsel's part, given the seriousness of the charges and the overwhelming evidence against Applicant, it is highly unlikely the result of the proceedings would have been any different. It is also highly unlikely Applicant would have insisted on trial, because a plea was certainly in his best interests. Finally, this Court finds Counsel's representation of Applicant and handling of this case were well within the standards required for effective representation.

Accordingly, this Court finds Applicant did not demonstrate any deficiencies in Counsel's representation. This Court finds that because Counsel's representation was well within the range of competence required in criminal cases, Applicant has failed to make any showing that, but for Counsel's alleged deficiencies, the result of Applicant's case would have been any

different.

### ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present ~~sufficient~~ <sup>any credible</sup> evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

### CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Plea counsel rendered effective assistance in regard to the claims raised by Applicant. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

### IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19<sup>th</sup> day of December, 2014.



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EDGAR W. DICKSON  
Presiding Judge  
Twelfth Judicial Circuit

Orangelay, South Carolina

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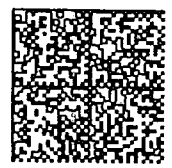
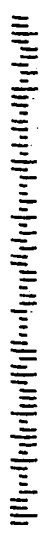
& ASSOCIATES  
ATTORNEYS AT LAW

4701 Oleander Drive ♦ Myrtle Beach, SC 29577  
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Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

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